No. 24-718

IN THE
Supreme Court of the United States

BLAKE WARNER,

Petitioner,

v.

SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY FOR PETITIONER

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INTRODUCTION

The Board does not defend the counsel mandate, and it is indefensible. Nor do the Board's vehicle arguments hold up to scrutiny. The underlying case—the 1029 case—cleanly presents the counsel mandate issue and is not affected by the merits dismissal in the separate 181 case. Plus, there *is* a circuit split, and petitioner would likely have prevailed if his case arose in other circuits. Regardless of quibbles over the contours of the split, this case warrants review. Lower courts and leading judges have observed that the counsel mandate cannot be squared with either the governing statute or the Constitution. Only this Court's action can rescue constitutional freedoms from decades-old, poorly reasoned circuit precedents that have tied the hands of the appellate courts.

ARGUMENT

I. THE BOARD DOES NOT DEFEND THE COUNSEL MANDATE

A. The Brief in Opposition is more notable for what it does not say than what it does say. The Board makes no effort to defend the counsel mandate on the merits. It does not dispute that the counsel mandate (1) conflicts with any fair reading of § 1654, (2) flouts the common law,[1] and (3) unconstitutionally imposes a pernicious policy that harms indigent children and impinges parental rights. These implicit concessions are remarkable, yet unsurprising—as the petition and *amici* note, there is no cogent explanation for the counsel mandate.

Multiple circuit courts and respected judges have agreed, but considered themselves bound by longstanding circuit precedent. Pet. 27-28. The Ninth Circuit, for example, could not deny that its "rule is inconsistent with a child's statutory right to proceed 'personally' under [§ 1654], with a child's fundamental right of access to court and equal protection rights, and with parental rights regarding the care, custody, and control of children." *Grizzell* v. *San Elijo Elementary Sch.*, 110 F.4th 1177, 1179 (9th Cir. 2024), pet. for cert. filed, No. 24-812.[2] The panel below likewise described Mr. Warner's constitutional arguments as "appealing" and heavily quoted Judge Oldham's *Raskin* dissent eviscerating the counsel mandate. Pet. App. 8a. Faced with an indefensible rule of law, courts and the respondent alike simply decline to defend it.

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[1] At common law, parents had the right to represent their children *pro se*. See Fournier *Amicus* Br. 11; Fl. Legal Found. *Amicus* Br. 12.

[2] The petition in *Grizzell* was initially circulated for the May 2 Conference and has since been rescheduled. Both cases merit review and could be considered together, providing the Court the opportunity to simultaneously address similar counsel mandate rules from two circuits.

B. The Board instead denigrates Mr. Warner's litigation conduct. It questions why Mr. Warner did not seek "leave to have counsel appointed" for J.W. or "proceed in forma pauperis." BIO 5. But for many parents, this will be a fruitless exercise given the severe shortage of free and low-cost legal services in the United States. See Pet. 12. Moreover, children have a right to proceed *pro se* in the first instance—like all other litigants in federal court. See *Faretta* v. *California*, 422 U.S. 806, 834 (1975) ("To force a lawyer on a [litigant] can only lead him to believe that the law contrives against him."). The child's parent—who all agree may direct the litigation on behalf of the child—likewise has the right to represent the child *pro se.*

The Board next attempts to paint Mr. Warner as incompetent to litigate J.W.'s claims. This narrative could not support a blanket counsel mandate in any event, Pet. 17-19, but it also fails on its own terms, relying on misleading statements and half-truths. To take one example, the Board notes that "[t]he District Court struck Petitioner's motion for a preliminary injunction" in the 181 case after he "conceded 'that irreparable harm is unlikely.'" BIO 4. But it neglects to mention that irreparable harm could no longer be proved because the Board changed its boundary plans *after* Mr. Warner filed his motion. See 181 ECF Doc. 20.

Mr. Warner is a sophisticated *pro se* litigant. See Pet. 18. He exemplifies the caring but inadequately resourced parent harmed by the counsel mandate.

* * *

There is no plausible defense for the counsel mandate. For the reasons given by Judge Oldham in *Raskin* and Judge Wardlaw in *Grizzell*, this important issue warrants plenary review.

II. THE PETITION CLEANLY PRESENTS THE ISSUE

Seeking to avoid review of this critical issue, the Board makes two "vehicle" arguments, contending that petitioner's substantive causes of action "are actually precluded by a prior release," and that "the underlying case has since been dismissed on those grounds." BIO 1. Even if true, those assertions would not weigh against review. Whether Mr. Warner would ultimately prevail *on the merits* if he is allowed to proceed *pro se* is irrelevant to whether he is entitled to represent J.W. in the first place.

In any case, neither of the Board's claims is true. First, the 1029 case, not the later-dismissed 181 case, underlies this Petition. Only the 1029 case contains the correct parties, claims, and court orders necessary to present the counsel mandate issue to this Court.

And second, that case is not barred by the release agreement. The agreement expressly carved out claims that arose after the date of its execution. J.W.'s claims in the 1029 case accrued more than a year after the release was signed. Therefore, a reversal in this Court would allow Mr. Warner to continue litigating J.W.'s claims in that case.

A. The underlying case is the 1029 case, not the 181 case

The Board claims that the 181 case is "the case underlying this Petition." BIO 3. That is simply incorrect. J.W.'s claims are found in the 1029 case alone, as the court of appeals' decision reflects. See Pet. App. 2a-5a. Those claims were dismissed exclusively on counsel mandate grounds, which was the only issue on appeal. The 181 case, by contrast, contained *only* Mr. Warner's claims and was not the subject of the underlying appeal. The final judgment in that case thus could not be, and was not, based on the counsel mandate.

1. The first-filed case—the 181 case—initially included J.W.'s *and* Mr. Warner's claims. BIO 3. Later, however, Mr. Warner amended the 181 complaint to include only claims on his own behalf, not J.W.'s. See Pet. App. 4a n.3 ("Warner timely amended his complaint in the 181 Case, asserting only his own claims."); BIO 5 (noting that Mr. Warner "remov[ed] counts he had purported to assert on behalf of J.W." in the 181 case). Therefore, J.W. is not a party to the 181 case and brought no claims in it.

While the 181 case was pending, Mr. Warner filed a separate action—the 1029 case—on behalf of J.W. and himself. Pet. App. 10a. This case was distinct from the 181 case. Whereas the 181 case challenged the Board's county-wide districting practices, the 1029 case challenged J.W.'s school assignment for the upcoming school year. *Id.* at 3a.

2. The district court "quickly dismissed" the 1029 case. BIO 4. It dismissed J.W.'s claims solely on the ground that Mr. Warner could not represent J.W. *pro se*.[3] Pet. App. 12a-13a; Pet. 3; BIO 4-5. The 1029 dismissal order described the 181 case as "a pending, earlier-filed action" distinct from the one it was resolving. Pet. App. 10a.

Mr. Warner "appeal[ed] the order dismissing his minor child's claims," *id.* at 2a, but did not appeal the dismissal of his own claims in the 1029 case, *id.* at 5a n.5. While the 1029 case (now containing only J.W.'s claims) went up to the Eleventh Circuit, the 181 case (now containing only Mr. Warner's claims) proceeded to a final judgment in the district court. BIO 6-7.

3. The only issue on appeal was whether the district court erred in dismissing J.W.'s claims pursuant to the counsel mandate. Pet. App. 5a & n.5. That was at issue only in the 1029 case.

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[3] The district court dismissed Mr. Warner's claims in that case for improper claim splitting. Pet. App. 13a.

The 181 case, by contrast, contained only Mr. Warner's claims and had nothing to do with the counsel mandate. The district court dismissed the 181 case as barred by an earlier settlement. BIO 7. So while both the 181 and 1029 cases were formally included on the Eleventh Circuit's docket, only the 1029 case that underlies this petition presents the counsel mandate issue.[4]

* * *

Thus, there is a "case in which petitioner could litigate for J.W. if he won his argument in this Court." *Id.* at 8. The claims in the 1029 case are J.W.'s alone. Those claims were dismissed solely because of the counsel mandate. If this Court reverses, Mr. Warner will be able to litigate J.W.'s claims on remand in the 1029 case.

B. The release agreement does not foreclose J.W.'s claims

Emphasizing the merits of the underlying claims rather than the question presented, the Board contends that the district court's dismissal of all claims in the 181 case as barred by a settlement agreement means that J.W.'s claims underlying the petition are also "gone as a matter of contract." *Ibid.* This merits argument based on what happened in a different case is irrelevant to the suitability of this case to address the counsel mandate. In any event, the 1029 case that underlies the petition contains distinct claims on behalf of J.W. that are not barred by the release that led the district court to dismiss the 181 case.

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[4] Both cases appeared on the appellate docket because Mr. Warner noticed an appeal of both cases out of an abundance of caution. He did so because "[t]he district court entered its dismissal order in the 1029 Case and then filed a copy on the docket in the 181 case." Pet. App. 4a n.2. But because the live complaint in the 181 case did not contain any claims on J.W.'s behalf when Mr. Warner noticed his appeal, only the 1029 case presented a controversy over the counsel mandate.

1. The release agreement does not apply to claims arising after it was executed. Quoting the agreement, the Magistrate Judge noted that it does "not cover * * * any new claim that may arise by reason of an act or omission occurring after the Effective Date of this Agreement." 181 ECF Doc. 112 at 12. The Magistrate Judge thus concluded that "[t]he plain language of the release covers all claims 'specifically related to J.W.'s education' that existed as of March 15, 2022." *Ibid.* The district court adopted the report and recommendation after finding that it contained "no error." 181 ECF Doc. 120 at 2.

2. J.W.'s claims in the 1029 case that is the subject of this petition are not covered by the agreement. All of those claims accrued on May 9, 2023—more than a year after the release was signed. 1029 ECF Doc. 19 at 2-3. Thus, the judgment in the 181 case would not defeat J.W.'s claims in the 1029 case, even if that merits issue were remotely relevant to whether Mr. Warner is entitled to represent J.W. *pro se*. BIO 7.

* * *

J.W.'s claims in the 1029 case squarely present the counsel mandate issue and are not affected by the merits dismissal in the separate 181 case. There is no vehicle issue preventing this Court's review.

III. Lower-Court Disagreement Over The Counsel Mandate Supports Certiorari

The Board admits that the lower courts "differ on certain details" about the counsel mandate, yet maintains that there is no "circuit split." *Id.* at 8. In reality, there *is* a conflict among the courts of appeals that was likely material on these facts. But even if not, the key point is that J.W.'s claims—like countless other parental *pro se* claims—were erroneously dismissed at the threshold rather than heard on the merits. This Court has never unstintingly required a circuit split as a prerequisite for

certiorari. And that policy makes sense where lower courts have flagged an important federal issue barred by circuit precedent for this Court's attention.

A. The Board repeatedly concedes confusion among the circuits. See BIO 1 (admitting that "there is some difference among the Circuits in the manner in which [the counsel mandate] is applied and if and when exceptions can be made"); *id.* at 8 (stating that some "circuits differ on certain details" of the counsel mandate); *id.* at 12 (noting that "some circuits have 'taken a more flexible approach'" than others (quoting *Grizzell*, 110 F.4th at 1179)).

The Board nonetheless maintains that "there is no actual split of authority on the issue of whether a non-lawyer can, as a general matter, represent another person in federal court." BIO 7. The Board's framing of the lower courts' agreement at this level of generality gives away the game, for the circuits disagree on important and often case-dispositive rules for when a parent may represent his child *pro se*. Pet. 20-26. The Ninth and Eleventh circuits, for instance, apply an ironclad rule that permits no exceptions to the counsel mandate. *Id.* at 25-26. The Fifth Circuit, however, held that an inflexible counsel mandate "is inconsistent with § 1654." *Raskin on behalf of JD* v. *Dall. Indep. Sch. Dist.*, 69 F.4th 280, 282 (5th Cir. 2023). Other circuits, too, "have relaxed" the counsel mandate in various contexts, in contrast with the Ninth and Eleventh Circuits' bright-line rule. *Grizzell*, 110 F.4th at 1179-1180 (discussing the Second, Fifth, Seventh, and Tenth circuits).

What is more, the Board ignores cases where courts have permitted a parent to represent his child even though the claim was not the parent's own. See Pet. 25; *Murphy* v. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 201 (2d Cir. 2002) (relaxing the counsel mandate because it was not "in the best interest" of the child to re-litigate the case "with licensed representation in order to re-secure a victory already obtained" by his *pro se* parents)

(Sotomayor, J.). Multiple courts therefore reject the unyielding counsel mandate applied below.

B. That split was likely determinative here. Of central relevance, the Fifth Circuit allows a parent to proceed *pro se* on behalf of her children if "federal or state law authorizes her" to do so. *Raskin*, 69 F.4th at 287. As the Board and *amici* note, Florida law authorizes Mr. Warner to proceed *pro se* on behalf of J.W. See BIO 9; Fl. Legal Found. *Amicus* Br. 4-11; Fournier *Amicus* Br. 9; Capability Consulting *Amicus* Br. 4-5. But state-law authorization could not aid Mr. Warner under Eleventh Circuit precedent, which "admit[s] of no exceptions" to the counsel mandate. Pet. App. 7a. Because Mr. Warner would have been able to proceed in the Fifth Circuit, it is untrue that the circuit split "is of no help to Petitioner." BIO 12.

C. Even if there were no outcome-determinative circuit split here, certiorari is nonetheless warranted to address this important and entrenched error of federal law. A recent example illustrates the point. This Court granted review and decided *Lackey* v. *Stinnie*, even though "the eleven Courts of Appeals" had adopted a rule contrary to the one this Court adopted. 145 S. Ct. 659, 671 (2025) (Jackson, J., dissenting).

To the extent courts all embrace some form of the counsel mandate, they are all wrong, just as they were in *Lackey*. Their construction of § 1654 is incoherent, Pet. 13-15, and rests on flawed policy rationales that the Board does not defend, *id.* at 15-19. Not only is their misreading erroneous, but it also jeopardizes multiple fundamental constitutional rights. *Id.* at 5-13. And no one can dispute that the issue is important and frequently recurring.

D. There is no further "percolation" to be had. The D.C. Circuit is the only court of appeals yet to squarely address the counsel mandate. Other courts are bound by decades-old precedent that relied on judicial notions of

sound policy and did not confront the weighty statutory and constitutional arguments raised in recent years. When those arguments were forcefully advanced in separate judicial writings at the panel stage, courts have repeatedly refused to grant rehearing en banc to correct their errors. This Court's review is the only hope for indigent parents and children seeking to exercise their fundamental rights.

Respectfully submitted.

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